IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2008 Session

JEFFERY WAYNE ROBERTSON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Lawrence County
No. 24363 Jim T. Hamilton, Judge

No. M2007-01378-CCA-R3-PC - Filed February 5, 2009

A Lawrence County jury convicted the Petitioner, Jeffery Wayne Robertson, of first degree murder. The trial court ordered him to serve a life sentence in the Tennessee Department of Correction. On direct appeal, this Court affirmed the Petitioner's conviction and sentence. The Petitioner then filed a petition for post-conviction relief, which the post-conviction court denied. The Petitioner now appeals, arguing that his trial counsel was ineffective because he: (1) failed to challenge evidence gathered during a search of the Petitioner's parents' home; and (2) failed to challenge expert testimony pertaining to comparative bullet lead analysis. The Petitioner also argues that he was denied due process at trial because the trial court failed to properly exercise its function as "gatekeeper" concerning the admissibility of the comparative bullet lead analysis expert witness testimony. After a thorough review of the record and applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Stanley Kurt Pierchoski, Lawrenceburg, Tennessee, for the Appellant, Jeffrey Wayne Robertson.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Benjamin A Ball, Assistant Attorney General; T. Michel Bottoms, III, District Attorney General; James G. White, II, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

On direct appeal, this Court set forth the following factual summary:

The victim, Carol Ann Patterson, was discovered dead in her Lawrence County home on Tuesday, July 16, 1996, a single gunshot wound to the face as the cause of death. Her former boyfriend, Jeffery Wayne Robertson, was tried and convicted of the murder.

Leon Jennings, a coworker of the defendant, testified to conversations that took place between the two about the victim in July of 1996. The defendant talked about the victim "quite a lot" and said he was afraid that if he went to the victim's house and saw her there with someone else, "there might be a fight" and "he might hurt her." The victim would not allow the defendant to come to her home on Sundays or Mondays, and the defendant told Jennings that he suspected "maybe somebody else was coming over on . . . those days." Jennings suggested that, if he were the defendant, he would watch the victim's house.

Travis Paul Maples, II, testified that he was eighteen years old at the time of trial and had known the defendant from their working together at Carson Kelly's barn. He said that, about a month after the victim's death, he had asked the defendant "what he knew about the murder." The defendant "said that [the victim] was found sitting up with a book in her hand, and that he heard that she was shot with a .22 long rifle." Additionally, the defendant said "that there was no forced entry, and whoever had done it had to have gone out the back door; entered and exited the back door. The door furtherest from Waterloo Road."

On cross-examination, Maples said he had first told law enforcement authorities about these conversations with the defendant only a week before the trial. He said that he had been contacted by authorities and gave his statement as a result.

Sherry Sherrill, the victim's daughter, testified about an altercation that took place between the defendant and the victim on July 12, 1996, four days before her body was discovered. The victim and the defendant were arguing in the driveway when a man in a Volkswagen drove by and waved. The victim waved back, which prompted the defendant to inquire about the driver's identity and exclaim, "If I couldn't have you, nobody else would."

Spring Maldonado, a family friend, also witnessed the July 12 confrontation and testified that the defendant, who appeared to be drunk, told the victim "that if he found out that she was messing around with that guy that was driving that Volkswagen, that he would kill her." Then, addressing Maldonado and her sister, the defendant said he would kill them "if [he] f[ou]nd out that you whores [were] trying to get in between [him] and Carol."

Richard Eddings, who was dating Sherry Sherrill, also witnessed the defendant and victim's argument on July 12 and said that the defendant was "real upset" and was "yelling" and "fussing" with the victim. The defendant then invited Eddings to "go riding around with him," and Eddings related the conversation that occurred:

> [H]e asked me would him and her ever have a chance back together. And I said, well, if he quit his drinking, he probably would.
>
> And he got upset, saying, "Well, it ain't my drinking what [sic] caused us to breakup." And he got mad at me, 'cause I said that. And he said, "Well, ain't nobody gonna have her, if I can't have her."

Eddings testified that the defendant confronted him and Sherry the next day at Houser's Grocery and demanded that they reveal the victim's whereabouts. When Sherry refused, the defendant grabbed her arm and raised his hand as if he were going to hit her and said, "You better tell me where she's at." Frightened, Sherry relented and told the defendant that her mother was at the swimming hole, to which he replied, "Does she have a boyfriend down there?" and "You and your mother's ass is grass." Eddings and Sherry found the victim, informed her of the incident, and returned home. Shortly thereafter, the defendant arrived and threatened to take the victim's children away and again questioned her about with whom she associated. According to Eddings, "[S]he told him it was her life, and who she was with down there was none of nobody's business." Eddings added that the defendant gave him the "ugliest look" because he suspected that the victim and Eddings "had something going on." The defendant told Eddings "that he better not catch [him] and her doing anything."

Stephen Sherrill, the victim's fifteen-year-old son, testified that the defendant dated his mother for "about a year-and-a-half" and that he lived with them for "about a year." He characterized his mother's relationship with the defendant as being "pretty good" before it "went for the worse."

Stephen testified that, on July 12, the defendant came to the house where he argued with the victim before leaving "in a rage." On July 13, he and the victim were driving

home when the defendant "pulled in front of [them]," and another argument ensued in which he described the defendant as "very mad." During this roadside confrontation, the victim waved to a man driving a camouflaged Volkswagen "bug" and revving his motor. This display caused the defendant to demand the driver's identity and state, "If I couldn't have you, nobody else could."

On Sunday, July 14, the defendant invited Stephen to go swimming, and the two met at a cemetery according to plan. The defendant began talking about the victim as they left the cemetery, making such comments as "[h]er butt is grass" and "[t]hat bitch would be better off dead." Instead of swimming, they worked on a tractor and the defendant continuously asked Stephen who the man driving the Volkswagen was. Stephen eventually called his mother to pick him up and, upon her arrival, the following occurred:

> They got in an argument. And she said to get in the car. So I got in the car, and whenever I did, he reached in and grabbed the keys. So she got out, real mad, and said, "Let's go. We're going to walk."
>
> Well, he grabbed her by the arm and twisted it, and she started crying. After he let her go, we started walking again, and he threw the keys back to her.
>
> When we got back in the van, he started going-he said he was going; for me to get in the back, so I did. We got up the road a little piece and he knocked the gear shift into neutral, and they argued a little bit more. And he asked who the man was that was in the Volkswagen, and she said that she didn't know. And he kept asking and asking, and she finally said, "His name is Robert. Now, let us go."

The two returned home, and Sherry Sherrill testified that the victim, as she arrived, was "crying and . . . shaking" and "that she had a red mark on her arm." Sherry testified that, in the days before the murder, the defendant was jealous, possessive, and "kept getting more and more angry as the week had went on." Stephen also noticed that the situation was getting progressively worse: "[The defendant] got angry every night of the week, just about, because mom won't take him back. And their arguments would get worse and worse. And Sunday [the day before the day the victim was last seen alive] was the worse [sic] I ever seen."

Stephen testified that, between Monday and Wednesday of the week before his mother was killed, he and others had "shot all of the .22 ammunition," all of which had been manufactured by Winchester. He acknowledged on cross-examination that he had not searched the house to see if there was additional ammunition, but there was none left in the drawer where it was kept. On Thursday of that same week, the defendant had come to the victim's house "to get .270 shells to go hunting that day" and asked Stephen "[w]here all the bullets went." Stephen told the defendant that "we

shot them all that week." Asked to review the owner's manual for a Marlin Model 70P "Papoose" semi-automatic .22 carbine, Stephen responded, "That was the break apart .22 that held seven rounds that was there when we shot all of the bullets to it and the single shot." He said that this rifle was at the house when they had fired all of the .22 bullets, but it later was missing.

Bobby Houser, the proprietor of Houser's Grocery, testified that the victim came to his store on Monday, July 15, at approximately 5:00 p.m. and purchased a Mountain Dew. She left in her car heading in the direction of her home, which was about a quarter of a mile away. Wade Durham testified that he was at Houser's Grocery around 5:00 p.m. that day and witnessed the victim make her purchase and chat with Houser before heading home. He said that he left a "minute or two" after the victim and arrived at his home, which was about a quarter of a mile away, at about 5:05 p.m.

The defendant's father, Eugene Robertson, testified on direct examination that his house was about three-quarters of a mile from the victim's house. According to his trial testimony, sometime between 5:00 and 5:30 p.m. on July 15, he saw the defendant walking home from the direction of the victim's house. He further testified that the defendant appeared "completely normal" and not nervous or agitated. During redirect examination by the State, Robertson was asked to identify a written statement which he earlier had given to Tennessee Bureau of Investigation ("TBI") Agent Mike Cox, but, instead of simply reviewing the statement, he proceeded to read it aloud in its entirety without objection by the defense. According to the statement, Robertson had sat on his "porch until about 5:30 p.m." on July 15, and "[a]bout that time, [the defendant] came walking up to the house." On cross-examination by defense counsel, Robertson claimed he had told Agent Cox that the defendant had come to the porch "[b]etween 5:00 and 5:30," as he had testified in court, but he could not recall "exactly which."

Carson Kelly, the owner of Kelly's Dairy Farm, testified that the defendant, although scheduled to work, never came to the dairy farm on Monday, July 15. On cross-examination, Kelly said that it was possible the defendant had come to work on the 300-acre farm, and Kelly just had not seen him. However, on redirect examination, Kelly testified that he would daily instruct the defendant as to what work should be done and the defendant did not "normally" work without seeing him.

Bobby Houser testified that the defendant was in his store around 6:30 a.m. on Tuesday, July 16, to purchase cigarettes on his way to work at Kelly's Dairy Farm. Sherry Watson, an employee of Houser's Grocery, testified that the defendant twice came into the store later that day to buy beer. According to her testimony, the defendant was quieter than usual and said that he had learned over the weekend of the victim's new boyfriend.

Paramedic Larry Glass testified that he arrived at the victim's home on July 16 and

entered through the kitchen door. He first observed a pressure cooker on the stove that "was really boiling." After turning off the stove, which he noticed was on high, he discovered the victim on the couch with "a little stuffed animal beside her." She had no "vital signs." He then called the county coroner and investigators.

Harwell McClusky, an officer with the Lawrence County Sheriff's Department at the time of the investigation, arrived at the victim's house on July 16 at about 10:20 a.m. and was the first member of law enforcement to arrive on the scene. As he entered the house, he checked to see that the stove was off because he could smell that something had been burning. He then located the victim's body, noticed that there was no weapon in sight, and secured the crime scene.

TBI Special Agent Wayne Wesson testified that he arrived at the murder scene on the morning that the victim's body was discovered. He entered the victim's kitchen through the back door and first observed a large pot of peeled tomatoes, a sink full of tomato peelings, a half-full bottle of Mountain Dew, and a pressure cooker on the stove that was later determined to contain seven jars of green beans that had been almost "boiled dry." Drippings from the boiling had developed on the top of the pressure cooker. On top of the refrigerator was a prescription medicine bottle with the defendant's name on the label.

Agent Wesson then entered the living room, where he saw the victim sitting on the couch with an opened book at her side, blood running down the side of her face, an empty Federal shell casing in her lap and under her arm, and a purple stuffed animal that read "I love you" propped on her shoulder. Wesson testified that she had suffered a single gunshot wound to the face. He described the victim as "[n]ot really in a defensive-or running-type of position. Just sitting there." A shotgun and a Noble .22 rifle were found in a gun cabinet in the living room. It was later learned that a Papoose .22 rifle was missing from the house. Also recovered were a Federal shell casing, which had dust on it and "looked like it had been there a while," and two dud .22 rounds, both of which were on top of the gun cabinet, and thirteen shell casings, all of which were manufactured by Winchester, in the backyard. Agent Wesson explained the results of the investigation as to the recovered shell casings:

> The casing–the Federal casing found on top of the gun cabinet was consistent with the casings that were fired from the Noble rifle. It was fired from the Noble rifle, and the casing in [the victim's] lap was fired from the same rifle that fired the remaining casings in the back yard. That's the single. This is the one that was fired in her lap.

Wesson testified that ammunition recovered by an investigator from the home of the defendant's father was sent to the TBI Crime Lab for comparison with the slug removed from the victim. These cartridges, which were .22 caliber Federal ammunition, were of the "same type of casing" as that recovered under the victim's

arm and were sent by the TBI to the Federal Bureau of Investigation ("FBI") Crime Lab for analysis. Additionally, he sent to the TBI Crime Lab the Noble .22 rifle from the victim's house and the Revelation .22 rifle from the defendant's residence. Special Agent Tommy Heflin, a TBI forensic scientist, testified that his tests showed that neither the Noble nor the Revelation rifle had fired the slug removed from the victim, but it was the "same type and design" of bullet that would have been housed in the .22 Federal shell casing found in the victim's lap.

Agent Wesson testified that he extensively searched the area around the victim's house to try and locate the missing weapon. It took twelve to fifteen minutes for him to walk the distance from the victim's house to that of the defendant's father where the defendant lived.

Agent Wesson was asked on direct examination whether he had done any additional investigation after taking the statement from Travis Paul Maples, who said he was told by the defendant that the victim "was found sitting up with a book in her hand," that there was "no forced entry," and that the assailant had to have "entered and exited the back door." Wesson replied:

> A. After receiving the statement from him, I reviewed the photographs to determine whether or not the book would have been visible-the book sitting beside [the victim] would be visible from the cased opening area. And also, I done some subsequent interviews.
>
> Q. All right, sir. Did you review any newspaper articles concerning this case?
>
> A. Yes, sir, I did.
>
> Q. How many interviews–how many articles did you review?
>
> A. I don't know the exact number of articles, but with the help of Kim McGee at the D.A.'s Office, we acquired all of the articles from the local papers, including Columbia, that were published within a four-week period of this happening, and any other ones that they might have had during and around that time.
>
> In those articles–I read each of those articles, and I found no information that would indicate to anyone that the book–what [the victim] was doing when she was killed. There is no information in there that indicated that she was reading a book when she was killed.

> And there was no information in there indicating where the assailant would have entered or exited the residence.

Another TBI forensic scientist, Special Agent Russell Davis, examined the gunshot residue kit that was taken from the defendant almost twenty-four hours after the murder. The procedure used with a gunshot residue kit was to swab the suspect's palms in order to determine the presence of antimony, barium, and lead, the three elements resulting when a firearm is discharged. He said that several factors could significantly affect the results of a gunshot residue analysis. In this instance, the twenty-four hours between the shooting, the samples taken from the defendant, and the facts that the ammunition involved was .22 caliber and that the weapon fired was a rifle, lessened the potential for conclusive testing. Davis explained that gunshot residue is "microscopic soot" on the skin's surface that disappears "the more you do with your hands," .22 caliber ammunition gives off less residue than other types of ammunition, and one's hands are not particularly close to where the residue is discharged when firing a rifle, as opposed to firing a handgun. He said that antimony and lead, in levels indicative of gunshot residue, were found on the defendant's hands. The results of his examination were "inconclusive," however, because the amount of barium, although present, was insufficient to indicate the presence of gunshot residue.

Agent Charles Peters, a physical scientist with the FBI laboratory in Washington, D.C., testified that he performs a "comparative bullet lead analysis" to determine whether a bullet taken from a victim is from the same source as other bullets taken from a suspect or a crime scene. He said that the manufacturer of a bullet could not be determined by just an analysis of the bullet itself, but such a determination could be made by doing a "compositional analysis" on the bullet and comparing that with a particular box of cartridges. He explained why different bullets would have the same composition:

> Bullets from the same melt of lead will have the same composition. And that's an unique composition. So basically, what we have done is we had a bullet fragment. We didn't know where it came from. Now we can say it came from this one melt of lead at Federal, and was produced on or about the date that is marked on this box.

> Now, we're not saying that–in that source of lead, a lot of bullets can be made. You know, just one box isn't made from a melt of lead. But other things that we also know about-the distribution and the use of ammunition–is that ammunition is basically bought up-particularly .22's–and shot in about two to three years after the ammunition is manufactured. Most of it has been shot up. And it no longer exists.

> So you have this caldron of lead that was used to make all of these bullets from, which are in the tens of thousands of bullets that comes from one caldron of lead. You can imagine, if you have this bucket of lead, here, how many bullets could be made from it. But in a very short time, those are being manufactured and being shot up.

Agent Peters received a box containing "Federal, .22 long rifle, 40 grain, lead, round nosed" cartridges. According to the stamp placed by the manufacturer on the cartridge box, it had been filled "on 6/29/1983 at the Federal plant in Minnesota." Following his analyses, Agent Peters determined that the slug taken from the victim was "analytically indistinguishable" from the unfired cartridges taken from the defendant's house. He explained further that, by this conclusion, he meant that the slug removed from the victim's body and the unfired cartridges all had come from "one melt of lead at Federal, and was produced on or about the date that is marked on this box." As to the slug removed from the victim, he said, "We know it originated from this source and we know that the source in this case is a very old source, and there wouldn't be very many of these left around."

Agent Wesson testified that he interviewed the defendant on the evening of July 16. The defendant, who waived his Miranda rights in writing, gave a statement in which he said that he spent the night at the victim's house on Sunday, July 14, and left early the next morning. The victim told the defendant that night and again the next morning that she wanted him "out of her life." The defendant acknowledged that he knew of the victim's involvement with a man named Robert who drove a "dune buggy, or something like that" and that "he didn't like it, but he didn't have any problem with it." He denied that he ever threatened the victim, touched her in any harmful way, or killed her. Finally, he explained that when he left the victim's house he went to his parents' house where he "stayed all day long."

The victim's mother, Sheila Schroder, testified that she taught her daughter how to can green beans when she was twelve years old, and her daughter was following the same directions at the time of her last canning session. She shipped the victim's pressure cooker to Agent Wesson and provided him with the same specific instructions for canning that the victim would have been following. The actual canned beans, which were not taken as evidence at the crime scene and had been sitting on Schroder's back porch for over a year, were also given to Wesson.

Agent Wesson testified that, following instructions which Sheila Schroder had given to the victim as to canning green beans, and using the victim's stove and pressure cooker, he left the cooker on the "high" setting on the stove for seventeen hours, the approximate period from when the victim was last seen alive at Houser's Grocery

until her body was found. He testified that the pressure cooker remained intact, and the jars of beans within appeared like those in the cooker when the victim's body was discovered.

Dr. Charles Harlan, the Lawrence County Medical Examiner, performed the victim's autopsy at 4:30 p.m. on July 16. According to his testimony, the victim had been dead for twelve to twenty-four hours before the autopsy was performed, putting the victim's time of death sometime after 4:30 p.m. on Monday, July 15, but before 4:30 a.m. the following day.

Frances Marie Robertson, the defendant's mother, testified as the first defense witness that the defendant had been at her home as of 6:00 p.m. on Monday, July 15, and was asleep on her couch as of about 6:30 p.m. that evening. She said that during the evening, she had gotten up two or three times and, on each occasion, he was still sleeping. In her view, the defendant had a "pretty good relationship" with the victim. She said that Stephen Sherrill sometimes had taken some .22 cartridges from the box taken by the TBI during their investigation of the killing.

During cross-examination, Mrs. Robertson said that the defendant had spent Sunday night at the victim's house. As for what time he arrived back at her house on Monday, July 15, she replied that she "didn't pay no attention [to] what time he came home ... I don't ever pay no attention to the clock." When questioned whether the defendant "stayed" at her house all day on Monday, she replied, "Well, he was in and out." She was unable to recall whether he had been at her house at 3:30 p.m. on Monday, July 15, saying that, because it was summer, she was keeping eight grandchildren at her house that day. She agreed that she had "probably" told a TBI agent, as her statement said, that "[m]y son, Jeffery Wayne Robertson, stayed at home that day probably at least 'til 3:30 P.M."

The defendant's brother, Glenn Robertson, testified that, because he had borrowed the defendant's truck to transport a cow, the defendant was without transportation from 4:30 p.m. to 6:30 p.m. on July 15.

Lisa Luna, the defendant's sister, testified that the victim and the defendant's father worked together and, when the victim did not arrive at work on July 16, he telephoned and asked her to check on the victim. Jennie Woodward, another of the defendant's sisters, lived next door to the victim. Sometime between 9:30 and 10:00 a.m. on Tuesday, July 16, the two sisters entered the victim's house through an unlocked door after their knocks went unanswered. They first heard the noise made by the pressure cooker, which was boiling on the stove. They then discovered the victim's body on the couch and immediately left and called 9-1-1. During her cross-examination, Woodward read aloud, without objection by the defense, the statement which she had given to Deputy McClusky. The defense made an unsuccessful objection to this statement's being marked as an exhibit after the witness had finished reading it.

> Following the testimony of Jennie Woodward, the defense rested. The defendant did not testify.

State v. Robertson, 130 S.W.3d 842, 844-52 (Tenn. Crim. App. 2003) (footnotes omitted). The jury convicted the Petitioner of first-degree murder, and the trial court ordered him to serve a life sentence in prison.

On direct appeal, the Petitioner challenged the admission of opinion testimony of a lay witness, the admission of three witnesses' statements, and the sufficiency of the evidence to support his first degree murder conviction. He did not claim on direct appeal that the trial court denied him due process when it failed, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* to act as a "gatekeeper" with respect to expert testimony offered at his trial. 509 U.S. 579, 593-94 (1993). This Court concluded the trial court did not abuse its discretion in admitting the opinion testimony and the three witnesses' statements, and we concluded the evidence was sufficient to support the Petitioner's conviction. *Robertson*, 130 S.W.3d 844-52. Accordingly, we affirmed the Petitioner's conviction for first-degree murder. *Id.*

The Petitioner filed a petition for post-conviction relief, which was later amended. In his amended petition, the Petitioner claimed seven distinct grounds for relief, the following three of which are relevant to this appeal[1]: (1) that he received the ineffective assistance of counsel because Counsel failed to move to suppress items seized during a search of the Petitioner's parents' house; (2) that he received the ineffective assistance of counsel because Counsel failed to challenge expert testimony about the results of a Comparative Bullet Lead Analysis ("CBLA") performed on evidence gathered by law enforcement; and (3) that the trial court denied the Petitioner due process when it failed to act as "gatekeeper" with respect to expert testimony about the results of the CBLA.

The post-conviction court held a hearing wherein the following evidence was presented: Investigator Donny Ferguson of the Lawrence County Sheriff's Department testified about his search of the Petitioner's parents' home in July 1996. Investigator Ferguson went to the home on July 16, 1996, in order to search for ammunition he believed would match bullets found at the crime scene. He did not have a warrant to search the Robertson home. The investigator testified that after obtaining permission to search from the Petitioner's father, Eugene Robertson, he entered and seized ammunition from a gun rack in a central hallway: "I told him what I was looking for. He gave me permission to go in and see if they were there. He said everything was kept on a gun rack. So I went around there. And I [saw] the shells. I got the shells." Investigator Ferguson did not recall whether the Petitioner's mother, Frances Marie Robertson, was present during the search. The investigator

[1]We omit claims asserted within the petition for post-conviction relief and testimony concerning allegations of ineffectiveness that the Petitioner does not assert on appeal.

returned a few months later, on November 18, 1996, and asked Eugene[2] to sign a document stating he consented to the July 1996 search. Eugene signed the document.

On cross-examination, Investigator Ferguson elaborated on the location of the gun rack from which he seized the ammunition: "I believe it was right inside the—As you go in the living room, it was right inside the hall through another door there. I think it was one in the kitchen." He confirmed the gun rack was not in a bedroom but in a public area of the house.

The Petitioner's mother, Frances Marie Robertson, testified that she was present during the search, and her husband Eugene was not. She explained her husband did not arrive home until he was released from work in the evening. Further, Frances said Investigator Ferguson did not seek her consent but simply informed her of his intent to search and proceeded directly into the house. She conceded that she did not try to stop the Investigator from entering.

Frances said that the Petitioner had been "staying" at the home she shared with her husband. She explained that he slept on the couch, freely came and went, and stored his clothes and belongings in their home. The Petitioner did not have a key to the house, although Frances said the family did not make a practice of locking the doors.

Tommy Robertson, the Petitioner's nephew, testified that he was present during the search of the Robertson home in July 1996. He was six years old at the time of the search and seventeen years-old at the time of the post-conviction hearing. Asked whether he remembered what transpired on July 16, 1996, between Investigator Ferguson and his grandmother Frances, Tommy responded, "I don't remember [anything]. I just know, she didn't give [him] permission to go in." He also stated his grandfather Eugene was not present during the search.

Eugene Wiley Robertson, the Petitioner's father, confirmed his wife's testimony that the Petitioner was living at their home in July of 1996. He testified that he was not present during the July 1996 search because he worked until 4:30 p.m. and that he, therefore, could not have consented to the search. Eugene explained, however, that a week after the July 16 search he did orally give officers permission to search his entire property. Regarding the consent form he signed in November 1996, he testified that the officers told him, if he signed the form, they would return his gun they seized during the investigation of the victim's murder. Eugene testified that he signed the document but did not read it.

The Petitioner testified he was living at his parents' home during July of 1996, that he "[came and went] there all the time," but that he was in Columbia, Tennessee, the day of the search. He testified, contrary to the testimony of both his mother and Investigator Ferguson, that Investigator Ferguson seized the bullets from his father's bedroom, not from a hallway gun rack.

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[2]We will refer to the various members of the Robertson family by their first names only for clarity. We mean no disrespect.

Lisa Luna, the Petitioner's sister, testified that she was present during the search of their parents' home on July 16, 1996. However, she said she could not hear what transpired between the Investigator and her mother because she was occupied caring for her child.

Special Agent Wayne Wesson of the Tennessee Bureau of Investigation ("TBI") testified that he worked with Investigator Ferguson in the investigation of the victim's death. He explained that after he received bullets from the crime scene, he asked Investigator Ferguson to search the Robertson home for ammunition that might match the bullets. Agent Wesson testified that Investigator Ferguson later presented him with both ammunition and a rifle that Ferguson seized during the search. After an analysis suggested the bullets from the scene of the crime matched the seized ammunition and he realized Investigator Ferguson had gained only verbal consent, Agent Wesson requested Investigator Ferguson to gain written consent to the July 16 search of the Robertson home.

Agent Wesson described a series of searches that he conducted on the Robertson property. He explained that he and his staff made several visits to the Robertson home and that each time Eugene consented to their requests without reservation.

The Petitioner's trial counsel ("Counsel") testified that he began practicing law in 1978 and that, at the time of the hearing, he worked for the Public Defender's Office in the 22nd Judicial District. Counsel explained he did not move to suppress the ammunition seized during the search of the Robertson home because, although the Petitioner was living with his parents, he believed the Petitioner lacked standing to challenge the search: "It was my opinion that the defendant did not have any standing to contest it, nor did he have a reasonable expectation of privacy."

Counsel testified that at the time of trial he did not doubt the reliability of the State's CBLA analysis because his research revealed it was a "reliable, accepted, [and] scientific way" to determine samples' similarity. He acknowledged the analysis had been "fully discredited" since the time of trial but emphasized he could not have foreseen its discrediting.

On cross-examination, Counsel recounted that he objected when the State's expert witness, Charles Peter, testified at trial to the results of the CBLA analysis. However, the trial court disposed of the objection by requiring Peters to confirm that CBLA analysis was "acceptable within the state of Tennessee." Counsel made no further objection and did not request a hearing outside the presence of the jury to determine the reliability of Peters' testimony about the CBLA analysis. Counsel believed Peters' testimony about CBLA analysis was "devastating" to the Petitioner's case because it was the most direct evidentiary link between the Petitioner and the shooting.

On redirect-examination, Counsel confirmed that he believed at the time of trial "it would not have been appropriate . . . to take up the court's time with a [*Daubert*] hearing" because he believed the State had laid a proper foundation for Peters' testimony.

After hearing argument, the post-conviction court entered a written order wherein it denied

the Petitioner post-conviction relief, and it is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that the post-conviction court erred when it found the following: (1) Counsel's failure to move to suppress evidence gathered during a search of the Petitioner's parent's house did not render his assistance ineffective; (2) Counsel's failure to challenge expert testimony concerning the results of the CBLA did not render his assistance ineffective; and (3) the trial court did not deny the Petitioner due process of law when it failed to conduct a *Daubert* hearing about the CBLA results.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to *de novo* review by this Court; however, we must accord these factual findings a presumption of correctness, which can only be overcome when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely *de novo* review by this Court, with no presumption of correctness. *Id.* at 457.

A. Counsel's Failure to Challenge Search of Petitioner's Parents' House

The Petitioner contends that Counsel was ineffective because he failed to challenge the search of Petitioner's parents' house. The State answers that Counsel appropriately chose to not move to suppress the evidence because the Petitioner lacked standing to challenge the search of his parents' house.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

In the case under submission, the Petitioner contends that Counsel's conduct at trial was deficient because he failed to file a motion to suppress evidence seized during the search of his

parents' home. Counsel said that he did not file a motion to suppress because, after reviewing the matter, he did not believe that the Petitioner had standing to challenge the legality of the search. The post-conviction court found Counsel's assistance was effective because it was based on Counsel's reasonable, correct conclusion that the Petitioner lacked standing. In order to prevail herein, the Petitioner must show that the evidence adduced at the post-conviction hearing preponderates against the court's finding that Counsel's failure to move to suppress the evidence was part of a reasonable, informed trial strategy based on adequate preparation. T.C.A § 40-30-103; *Williams*, 599 S.W.2d at 279-80. He must also show that Counsel's failure to challenge the evidence resulted in prejudice. *Id.*

In order to prove that Counsel's decision was unreasonable, the Petitioner must demonstrate at a minimum that he had standing to challenge the search of his parents' home because Counsel testified that his belief that the Petitioner lacked standing caused him to forego a motion to suppress. Furthermore, "[o]ne who challenges the reasonableness of a search or seizure has the initial burden of establishing a legitimate expectation of privacy in the place where the property is searched." *State v. Oody*, 823 S.W.2d 554, 560 (Tenn. Crim. App. 1991) (citing *Rawlings v. Kentucky*, 448 U.S. 98 (1980)). However, standing alone is not sufficient to establish ineffective assistance in this case. In order to demonstrate prejudice, the Petitioner must also prove that a motion to suppress would have been successful. Accordingly, we first address the Petitioner's standing before considering the legality of the search. *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

Under some circumstances, a guest has a reasonable expectation of privacy, which gives him standing to challenge a search of his host's home. *Minnesota v. Olsen*, 495 U.S. 91 (1990). The Fourth Amendment of the United States Constitution protects not only those expectations of privacy that derive from property interests but also those that derive from social custom. *Id.* The United States Supreme Court explained that, because a host customarily protects the privacy of his guests, "[an overnight guest] seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Olsen*, 495 U.S. at 98-99.

In Tennessee, a guest's standing to challenge the admission of evidence seized during the search of his host's home depends on whether the guest was a casual or regular visitor. *State v. Transou*, 928 S.W.2d 949, 958 (Tenn. Crim. App. 1996). A guest is only a casual visitor if he does not have a key to the home and otherwise does not have the right to exclude others from the residence. *Id.* A casual visitor, absent specific indicia of an expectation of privacy, does not have standing to challenge a search of his host's home. *Id.*; *see U.S. v. Dix*, 57 F.3d 1071 (6th Cir. 1995) ("As a casual, albeit frequent, visitor to his sister's apartment, who did not keep clothing there, who did not receive mail there, and who had no key, Dix had no reasonable expectation of privacy in the premises."). In contrast, a regular visitor does have standing to challenge evidence seized during a search of his host's home. *Transou*, 928 S.W.2d at 958. Typically, a regular visitor has a key or an ability to exclude others, enjoys unrestricted access, may stay overnight without the host's knowledge, and stores his belongings in the host's home. *Id*.

The evidence considered in the light most favorable to the State proves that on July 16, 1996, Officer Donny Ferguson searched the home of the Petitioner's parents without a warrant. The Petitioner was not present during the search. In the weeks leading up the search, the Petitioner had been sleeping on his parents' couch and storing his belongings in their home. He did not have a key to their home, but the Robertsons did not regularly lock their doors. After Officer Ferguson told the Petitioner's family he was looking for ammunition, the father gave Officer Ferguson permission to search the house and directed him to a gun rack in a central hallway. Officer Ferguson went to the gun rack and seized a box of ammunition. Counsel did not move to suppress the ammunition, and the State entered the bullets seized from the Robertson's home as evidence at trial.

In our view, the Petitioner had a legitimate expectation of privacy in his parents' home and, therefore, had standing to challenge the legality of the search. Sleeping on the couch and storing his belongings within the home, the Petitioner was a regular presence in the Robertson home. *See Transou*, 928 S.W.2d at 958. Furthermore, as a member of the Robertson family, the Petitioner could reasonably expect that his parents, who served as his hosts, would protect his privacy. *See Olsen*, 495 U.S. at 98-99. Regardless of the accuracy of Counsel's determination that the Petitioner lacked standing, the Petitioner must demonstrate prejudice in order to gain relief. Accordingly, we proceed to address whether Counsel's erroneous conclusion that the Petitioner did not have standing to challenge the search was prejudicial to the Petitioner.

In our view, the Petitioner has failed to prove Counsel's decision to forego a motion to suppress prejudiced the Petitioner. Evidently crediting Officer Ferguson's testimony over that of the Robertson family, the post-conviction court found that Eugene Robertson consented to the search, and the record does not preponderate against this finding. A warrantless search of a home is lawful if an owner of the home that is present consents to it. *State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002). Thus, the record does not demonstrate that, had Counsel filed a motion to suppress, a motion to suppress would have succeeded. The Petitioner cannot prevail on his claim of ineffectiveness of counsel because he has failed to prove prejudice.

B. Counsel's Failure to Challenge Expert Testimony Concerning CBLA

The Petitioner contends that the post-conviction court erred when it found that Counsel's failure to challenge Peters' testimony about CBLA analysis did not constitute ineffective assistance of counsel. The Petitioner argues specifically that Counsel should have requested a hearing outside the presence of the jury to determine the admissibility of CBLA analysis, and he discusses at length the form such a hearing would have taken. The State answers that Counsel reasonably concluded the testimony was reliable and thus appropriately chose not to request a jury-out hearing.

An attorney may challenge expert testimony by requesting a jury-out hearing (referred to as a "*Daubert*" hearing by the Petitioner) to determine whether the expert's testimony is reliable. However, an attorney need not request a jury-out hearing where he reasonably believes the expert's testimony is reliable. *Strickland*, 466 U.S. at 690. Furthermore, Counsel's representation of the Petitioner "is not to be measured by '20-20 hindsight.'" *Hellard v. State*, 629 S.W.2d at 9.

Therefore, we must evaluate the attorney's decision about whether to challenge expert testimony in light of his perspective at the time. In order to prevail herein, the Petitioner must show that Counsel's decision to not request a jury-out hearing was unreasonable given the information Counsel possessed at the time of trial.

At the post-conviction hearing, Counsel testified that he did not request a hearing to determine the admissibility of Peters' testimony because Counsel's research on CBLA analysis convinced him that it was a "reliable, accepted, [and] scientific" way of determining the similarity of bullets. At trial, Counsel objected shortly after Peters was sworn in, arguing that Peters must confirm that CBLA analysis was a "generally accepted experiment within the scientific community of Tennessee" in order to lay a proper foundation for his testimony. Prior to *McDaniel*, the standard of admissibility of expert testimony was whether it had "gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *McDaniel* replaced the *Frye* standard in 1997 with a more comprehensive test that does not require expert testimony to be generally accepted. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997). With *McDaniel* having been decided only a year prior to the Petitioner's 1998 trial, the community acceptance objection by Counsel appears to have caused the trial court to hold the State to a standard for admissibility of the evidence that was stricter than the *McDaniel* standard, which actually controlled. If Counsel "erred," the Petitioner benefitted from the "error." The trial court asked Peters to confirm CBLA's general acceptance, Peters did so, and the State proceeded to elicit the testimony at issue.

Several years after the jury convicted the Petitioner of first degree murder in 1998, the Federal Bureau of Investigation disclosed that its agents had overstated the significance of CBLA examinations. Since the Petitioner's conviction and the FBI's disclosure of the misleading nature of its agents' CBLA testimony, at least three cases have been reversed in sister jurisdictions. In *New Jersey v. Behn*, the New Jersey Superior Court, confronted with an FBI agent's trial testimony about CBLA analysis, granted post-conviction relief on the basis that the "erroneous scientific foundations and its admission met the requirements for granting a new trial on the ground of newly discovered evidence." 868 A.2d 329, 331 (N.J. Super. Ct. App. Div. 2005). In *Ragland v. Kentucky*, the Kentucky Supreme Court granted a new trial on direct appeal because it concluded the trial court erred in admitting an FBI agent's testimony on CBLA. 191 S.W.3d 569, 573 (Ky. 2006). Similarly, in *Clemons v. Maryland*, the Court of Appeals of Maryland reversed a conviction after determining that testimony about CBLA analysis did not meet the standards for scientific expert testimony. 896 A.2d 1059, 1061-62 (Md. Ct. App. 2006). In his brief, the Petitioner posits that, had a jury-out hearing occurred, the trial court would not have allowed Peters to testify because CBLA's flaws would have surfaced.

In our view, the Petitioner has failed to show that Counsel's decision to forego a jury-out hearing was unreasonable, given the information that Counsel had about CBLA analysis at the time of trial. Since the Petitioner's trial, the FBI has repudiated its agents' CBLA testimony. As a result, we now know that Peters' testimony about the CBLA analysis performed in the Petitioner's case may have been\ overstated and misleading. During the Petitioner's trial, however, Counsel did not have

the benefit of the FBI's retraction. The flaws in Peters' testimony came to light well after Counsel was confronted with the decision of whether to request a jury-out hearing. He did not know, and, in our view, could not reasonably have anticipated that CBLA would be discredited. Therefore, reviewing Counsel's decision in light of his perspective at trial, we conclude Counsel reasonably chose to forego a jury-out hearing. Counsel's assistance was effective. The post-conviction court properly declined to grant post-conviction relief based on Counsel's choice to not request a jury-out hearing on Peters' testimony.

C. Trial Court's Failure as "Gatekeeper"

The Petitioner contends that the post-conviction court erred when it failed to conduct a *Daubert* hearing and thus failed in its "gatekeeper" duties with respect to the expert testimony concerning the CBLA analysis. The State answers that the trial court did not abuse its discretion in allowing the testimony.

Tennessee's Post-Conviction Procedures Act informs petitioners filing for relief under its provisions that "a ground for relief is waived if a petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." T.C.A § 40-30-106(g) (2006). On direct appeal, the Petitioner did not raise his *Daubert* objection to the trial court proceedings before this Court, a court of competent jurisdiction in which the Petitioner could have presented such a claim. Therefore, the Petitioner's claim that the trial court failed under *Daubert* to appropriately evaluate Peters' testimony is waived. The Petitioner is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude the Petitioner has failed to demonstrate that the post-conviction court erred when it denied his petition for post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

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